Supreme Court, U.S.
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No. 92-96

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

PATRICIA A. MERTENS - - - - Petitioner

versus

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually and in his official capacity;
HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, Individually, in his official capacity;
THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity;
FRANK WILLEY (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity - - - - - - - - Respondents

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COMMONWEALTH OF KENTUCKY
CABINET FOR HUMAN RESOURCES
By: TRISHA ZELLER JAMES
Department of Law
275 East Main Street, 4-W
Frankfort, KY 40621
Assistant General Counsel

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY

QUESTIONS PRESENTED FOR REVIEW

Did Kentucky's narrowly taylored patronage practice impermissibly discriminate against the Petitioner where such practice furthers a vital government interest by retaining only those high level policy making officials who will loyally implement the policies of a duly elected administration?

Does the choice of state forum eliminate the heightened pleading requirements of claims brought under 42 USC § 1983?

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Table of Contents	ii
Table of Authorities	iii-iv
Counterstatement of the Case	2– 5
Reasons for Denying the Writ	5–16
I. The Kentucky Supreme Court Correctly Applied *Rutan* v. *Illinois* Which Recognized That There Is a Vital Government Interest in Retaining Only Those High-Level, Policy-Making Officials Who Will Loyally Implement the Policies of a Duly Elected Administration	6– 8
II. The Kentucky Supreme Court Held that where Petitioner Failed to Set Forth Non-Conclusory Allegations of Respondent's Discriminatory Intent, She Failed to State a Cause of Action Under the Heightened Pleading Requirements of 42 USC § 1983	8–16
Conclusion	16
Appendix	1a–10a

TABLE OF AUTHORITIES

PAGE

Cases:

Ana Leon T. v. *Federal Reserve Bank of Chicago*, 823 F.2d 928, 930 (6th Cir. 1987), *cert. denied* 108 S.Ct. 333 (1987) 9

Blackburn v. *Fisk University*, 443 F.2d 121, 124 (6th Cir. 1971) 9

Branti v. *Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) 4, 6, 7, 8

Chapman v. *City of Detroit*, 808 F.2d 459 (6th Cir. 1986) 9, 16

Douglas v. *City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943) 8, 9

Elrod v. *Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) 4, 6, 7, 8

Estelle v. *Gamble*, 429 U.S. 97, 104-05, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976) 13

Farah v. *Martin*, 122 F.R.D. 24, 26 (E.D. Mich. 1988) 9

Grant v. *Hollenbach*, 870 F.2d 1135, 1138 (6th Cir. 1989) 9

Haas v. *Berrien County Sheriff's Department*, 658 F.Supp. 877 (W.D. Mich. 1987) 10,11

Hall v. *Pennsylvania State Police*, 570 F.2d 86 (3rd Cir. 1978) 12

Harlow [v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)] 10

Hobson v. *Wilson*, 737 F.2d at 29. (D.C. Cir. 1984) 10, 11, 15

Kirkpatrick, Defining a Constitutional Tort Under Section 1983; The State-of-Mind Requirement, 46 U. Cin.L.Rev. 45 (1977) 14

Leatherman v. *Tarrant County, Texas*, 954 F.2d 1054 (5th Cir. 1992), *cert. granted* 60 L.W. 3851, June 23, 1992 6

PAGE

Martin v. *D.C. Metropolitan Police Department*, 812 F.2d 1425, 1433 (D.C. Cir. 1987), upon reh'g en banc vacated as to 1434 et seq. only 817 F.2d 144 (1987), and reinstated reh'g dismissed on reconsideration, en banc 824 F.2d 1240 (1987) 14

Place v. *Shepherd*, 446 F.2d 1239, 1244 (6th Cir. 1971) 9

Poe v. *Hayden*, 853 F.2d 418 (6th Cir. 1988) 9, 10

Rutan v. *Republican Party of Illinois*, 497 U.S. 62, 100 S.Ct. 2729, 2737 (1990) 4, 5, 6

Smith v. *Rose*, 760 F.2d 102, 106 (6th Cir. 1985) .. 16

Tanner v. *McCall*, 625 F.2d 1183, 1193 (5th Cir. 1980) 10

Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose In Civil Rights Litigation, 95 YALE 134-36 (1985) 14

Washington v. *Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976) 13

Wayne v. *United States*, 470 U.S. 598, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985) 13

Windsor v. *The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied*, 105 S.Ct. 105 (1984) 9

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PATRICIA A. MERTENS - - - - - - - *Petitioner*

v.

WALLACE G. WILKINSON, Governor, Commonwealth of Kentucky, Individually and in his official capacity;
HARRY J. COWHERD, M.D., Secretary, Cabinet for Human Resources, Commonwealth of Kentucky, Individually, in his official capacity;
THOMAS GREENWELL, Commissioner of Personnel, Commonwealth of Kentucky, in his official capacity;
FRANK WILLEY (Acting) Executive Director of Personnel Management, Commonwealth of Kentucky, Cabinet for Human Resources, in his official capacity - - - - - - - - - *Respondents*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Supreme Court of Kentucky entered January 16, 1992 in Case No. 90-SC-778-DG. That Opinion is unpublished.

COUNTERSTATEMENT OF THE CASE

Respondents, Cabinet for Human Resources, et al., agree in substance with Petitioner's procedural history of the case.

Petitioner, Patricia A. Mertens, was indeed hired by the Commonwealth of Kentucky April 1, 1987, pursuant to KRS 12.050, as the Division Director of Child Support Enforcement for the Cabinet for Human Resources. There was no employment contract. By statute [KRS 18A.115(i)] the position of division director is unclassified, unless certified for classification pursuant to KRS 18A.170. Mertens admitted in her complaint that her position was unclassified.

An individual holding an unclassified position is subject to dismissal upon written notice by the appointing authority ". . . for cause, or without cause." 101 KAR 3:050(3). Mertens admitted in her complaint that her dismissal on January 22, 1988 was without cause.

On January 20, 1989, almost a year after her dismissal "without cause", Mertens filed this action pursuant to 42 USC § 1983 in Franklin Circuit Court alleging violation of her constitutional rights under the First and Fourteenth Amendments. Specifically, she alleged in her original complaint that "a substantial or motivating factor . . . or the sole reason for the discharge of plaintiff by defendant . . . was her political beliefs."

Based on the heightened pleading requirements of actions brought pursuant to 42 USC § 1983, whether in federal or state court, the Franklin Circuit Court dismissed Mertens original complaint with leave to amend "to state non-conclusory allegations of evidence of unconstitutional

motive or intent." In her amended complaint she alleged "unconstitutional motive and intent." Mertens' subsequent complaint, although lengthy, again failed "to state a claim in terms of facts rather than conclusions," and on such basis was dismissed. Petitioner's motion to reconsider pursuant to CR 59.05 was denied. Petitioner appealed.

The Kentucky Court of Appeals decision was in three parts. First of all the appellate court upheld the circuit court's dismissal of Mertens' action for damages against the individual defendants in their official capacity, while holding that an action for injunctive relief against defendants was proper under § 1983.

The Court then analyzed the statutory scheme and held that Mertens' only option in appealing a dismissal without cause was an action in Franklin Circuit Court; Respondent's original argument that Mertens failed to exhaust administrative remedies was held to be without merit. It should be noted that Mertens' state court action was not, however, merely an appeal of the dismissal, but a separate action under 42 USC § 1983 alleging constitutional violations.

In the third part of its decision the Court of Appeals addressed the crux of the case before this Court on review and held that "[t]he requirements for asserting constitutional deprivations in § 1983 claims are the same for [sic] those establishing the underlying constitutional violations." Where Petitioner asserted deprivation of freedom of speech, she failed to assert "any conduct, speech, or belief that was constitutionally protected, nor [did she show] that the Respondents decided to dismiss her because of any such conduct." On this basis the Court of Appeals upheld dismissal of Mertens' complaint for failure to state a claim.

The Supreme Court of Kentucky granted discretionary review, but on January 16, 1992 affirmed the Court of Appeals. In pertinent part the Supreme Court held:

> It is clear that the First Amendment forbids discharge of public employees solely for not being supporters of the political party in power, *unless party affiliation is an appropriate requirement for the position involved. Rutan* v. *Illinois*, ___ *U.S.* ___, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990), *Branti* v. *Finkel, supra; Elrod* v. *Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Moreover, the U.S. Supreme Court stated in *Rutan* that a government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high level employees on the basis of their political views. S.Ct. at 2737, L.Ed.2d at 66, citing *Elrod* v. *Burns, supra.*
>
> We believe it is clear that Mertens' position, Division Director of Child Support Enforcement, is a significant, high-level position in the state government system. Only the Commissioner for Social Insurance and the Secretary of the Cabinet for Human Resources are closer to the Governor in the ranking system. It also involves supervisory duties of more than two hundred employees. The civil service laws embodied in Kentucky's statutory system clearly define the position as "policy-making." Division directors who are considered policy makers are not certified. If a division director disagrees, a hearing is held. The Division Director of Child Support Enforcement is not a certified position. Clearly, it is in choosing or dismissing individuals at this high-level of service that enables an administration to further the goals and implement the policies for which it was elected.
>
> There is no merit in Mertens' contention that *Branti* v. *Finkel, supra,* compels a different result. The plaintiffs in *Branti* held only entry level positions. None of

> the political patronage cases cited by Mertens dealt with high level office involved here.

As to the argument put forth by Mertens that because her § 1983 case was brought in state, rather than federal court, the heightened pleading requirements of actions brought under § 1983 need not be met, the Kentucky Supreme Court held:

> We do not agree. Pleading in federal courts, as in this Commonwealth, is notice pleading. It is only in actions brought pursuant to § 1983, where motive is the issue, that heightened pleading standards are mandated. The mere fact that state court claims do not require pleading with specificity is totally irrelevant to the issue of a § 1983 pleading.

REASONS FOR DENYING THE WRIT

Nowhere does Petitioner present a legitimate constitutional claim. She asserts that her constitutional rights were violated when the new Governor replaced her as Division Director of Child Support Enforcement with one of his political supporters. Her allegations are merely conclusive, not factual, and fail to meet the heightened pleading requirement of § 1983 actions.

In denying Petitioners claims, the Kentucky Supreme Court properly applied the principles of *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 100 S.Ct. 2729, 2737 (1990) in holding that the state has a vital interest in being able to choose or dismiss certain high level officials on the basis of their political views. The Kentucky Court also properly interpreted federal law in ruling that Petitioner's complaint failed to state a cause of action under the heightened pleading requirements of 42 USC § 1983. It should be noted, however, that this Court has

granted a writ of certiorari on the question of heightened pleading requirements in § 1983 actions: *Leatherman* v. *Tarrant County, Texas*, 954 F.2d 1054 (5th Cir. 1992), *cert. granted* 60 L.W. 3851, June 23, 1992.

I.

The Kentucky Supreme Court Correctly Applied *Rutan* v. *Illinois* Which Recognized That There Is a Vital Government Interest in Retaining Only Those High-Level, Policy-Making Officials Who Will Loyally Implement the Policies of a Duly Elected Administration.

Petitioner has maintained throughout the lengthy state court process that she is entitled to relief by proving, inter alia, that she was "demonstrably affiliated" with that faction of the Kentucky Democratic Party headed by a former Governor, Martha Layne Collins, a faction which allegedly did not support the subsequent Governor, Wallace G. Wilkinson, in his election, and that her termination was pursuant to a custom of the Commonwealth of Kentucky whereby unclassified employees, who are not politically allied with the newly elected Governor, are dismissed. This was, in essence, her complaint, that she was discharged from office because of political affiliation, yet this is precisely the practice that has been recognized and sanctioned, succinctly and successively by this Court:

> A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views. *Rutan* v. *Republican Party of Illinois*, ___ U.S. ___, 100 S.Ct. 2729, 2737 (1990); citing *Elrod* v. *Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed. 2d 547 (1976), and *Branti* v. *Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980).

There is no doubt that the office formerly held by Petitioner, that of Division Director of Child Support Enforcement, is a significant, high-level position in Kentucky's government hierarchy. Not only is it just three levels removed from the Governor[1], but it entails supervisory duties of well over 200 employees. Further, the civil service laws embodied in Kentucky's statutory scheme clearly define the position as "policy-making", and therefore non-classified (or non-merit).[2]

In *Elrod* v. *Burns, supra,* this Court held that a government can meet its need for politically loyal employees to implement policies by dismissing those employees in policy making positions. While *Branti* v. *Finkel* seemed to narrow the holding of *Elrod* by indicating that the mere label of "policy making" or "confidential" is insufficient to hold, afortiori, that a position is not protected from political dismissal, both *Branti* and subsequently *Rutan* upheld patronage dismissal where the hiring authority can show political and ideological affiliation to be an appropriate

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[1]The governmental hierarchy is: the Governor, the Secretary of the Cabinet for Human Resources, the Commissioner for Social Insurance, and the Division Director for Child Support Enforcement.

[2]While division director is statutorily defined as a non-classified, policy-making position there is a procedure, for review and classification where the duties of a particular division director are non-policy making in nature. [KRS § 18A.170] The position of Division Director of Child Support Enforcement has never been classified (or merit), and was certainly not classified when held by Petitioner. An individual in this office who is not politically and ideologically aligned with the Governor is certainly in a position to derail important administrative goals in the area of child support. (It is notable that child support issues have recently played a significant role in Kentucky's gubernatorial politics).

requirement for effective performance of the public office involved. None of these cases dealt with the high-level office at issue here. In *Elrod* this Court decided that a Democratic sheriff could not replace members of his office staff with members of his own party. In *Branti* this Court held that a newly *appointed* public defender could not discharge assistant public defenders for public affiliation. *Rutan* involved two low-level state employees, a rehabilitation counselor and a road equipment operator, a job-applicant, and two individuals who had not been recalled after layoffs. While the *Branti* plaintiffs alleged supervisory case responsibility of individual legal files, none of these petitioners held more than entry-level positions; none had personnel supervisory duties. As outlined above, the Division Director of Child Support Enforcement is far from entry-level. It is statutorily defined as an unclassified, policy making position, just three levels removed from the Governor, with supervisory duties for a staff of well over 200 entry-level and other classified, or merit, employees. Clearly it is in choosing or dismissing individuals at this high-level of services that enables an administration to further the goals and implement the policies for which it was elected.

II.

The Kentucky Supreme Court Correctly Held that where Petitioner Failed to Set Forth Non-Conclusory Allegations of Respondent's Discriminatory Intent, She Failed to State a Cause of Action Under the Heightened Pleading Requirements of 42 USC § 1983.

In order to state a cause of action under 42 USC § 1983 the Petitioner must have alleged that Respondent, acting under color of law, deprived her of some right, privilege or immunity secured by the Constitution. *Douglas* v. *City of*

Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943); *Poe* v. *Hayden,* 853 F.2d 418 (6th Cir. 1988).

In ruling on a motion to dismiss a court must accept as true all well-pleaded factual allegations in the complaint. [see *Windsor* v. *The Tennessean,* 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied,* 105 S.Ct. 105 (1984)]; however, the Court need not accept as true plaintiff's legal conclusions or unwarranted factual inferences. *Blackburn* v. *Fisk University,* 443 F.2d 121, 124 (6th Cir. 1971).

Indeed, to be sufficient to state a civil rights claim, "the allegations must be more than mere conclusions", *Ana Leon T.* v. *Federal Reserve Bank of Chicago,* 823 F.2d 928, 930 (6th Cir. 1987), *cert. denied* 108 S.Ct. 333 (1987), for the Court is "not bound by allegations that are clearly unsupported and unsupportable". *Place* v. *Shepherd,* 446 F.2d 1239, 1244 (6th Cir. 1971). See also: *Grant* v. *Hollenbach,* 870 F.2d 1135, 1138 (6th Cir. 1989).

In *Chapman* v. *City of Detroit,* 808 F.2d 459 (6th Cir. 1986) the Sixth Circuit held that:

> There is a sound reason for requiring that a civil rights action against a government official or employee *state a claim in terms of facts rather than conclusions.* When a government employee is sued, if no factual allegations are made, discovery and perhaps even trial may be required to demonstrate that the claim has no merit. Such activities require the government defendant and others such as government attorneys involved in defense of the claim to divert their attention from their usual activities and to become involved in the litigation to the neglect of their assigned duties. *Id.* at 465 (Emphasis provided).
>
> See also: *Farah* v. *Martin,* 122 F.R.D. 24, 26 (E.D. Mich. 1988), which cites *Chapman.*

In evaluating allegations of wrongful discharge in a § 1983 action the defendant's motive must be ascertained. *Tanner* v. *McCall,* 625 F.2d 1183, 1193 (5th Cir. 1980). The act itself—the act of discharge—is neutral; it is the motive or intent that makes the act both actionable and violative of clearly established law. *Poe* v. *Hayden,* 853 F.2d 418 (6th Cir. 1988).

In ascertaining motive in such cases, courts have consistently required more than a mere claim of the defendant's discriminatory intent.

> For section 1983 actions, however, *particularly those that implicate* concerns of official immunity [i.e. intent, motive or purpose], courts have established a standard of pleading that requires more detailed factual allegations than those required by the general "notice" pleading standard. As the Fifth Circuit recently stated, "[i]n the now familiar cases invoking 42 USC § 1983 we consistently require the claimant to state specific facts, not mere conclusory allegations.
>
> *Haas* v. *Berrien County Sheriff's Department,* 658 F.Supp. 877 (W.D. Mich. 1987). (Emphasis provided).

In the case of *Hobson* v. *Wilson,* 737 F.2d 1 (D.C. Cir. 1984), cited in *Poe* v. *Hayden,* 853 F.2d at 432, the D.C. Circuit held:

> *Harlow* [v. *Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)] focused on the need to enable courts to dismiss "insubstantial" lawsuits before discovery and trial, and it adjusted the qualified immunity defense to facilitate that goal. The kind of case we confront today, *involving allegations of unconstitutional motive,* offers to litigants a possible means to circumvent the new rule, simply by pleading that any act was performed with an intent to violate clearly established constitutional rights and thereby surmounting the threshold test set out in *Harlow.* We

> recognize that in some instances, plaintiffs might allege facts demonstrating that defendants have acted lawfully, append a claim that they did so with an unconstitutional motive and as a consequence usher defendants into discovery, and perhaps trial, with no hope of success on the merits. The result would be precisely the burden *Harlow* sought to prevent. *Accordingly, in cases involving a claim that defendants acted with an unconstitutional motive, we will require that nonconclusory allegations of evidence of such intent must be present in a complaint for litigants to proceed to discovery on the claim. Hobson* v. *Wilson,* 737 F.2d 1, 29 (D.C. Cir. 1984). (Emphasis provided).

Similar reasoning has been applied by District Courts in the Sixth Circuit in § 1983 actions implicating official immunity [i.e. intent, motive or purpose], and a higher more stringent standard of pleading than mere "notice" pleading, has been imposed. See, e.g. *Haas* v. *Berrien County Sheriff's Department,* 658 F. Supp. 877 (W.D. Mich. 1987), quoted *supra.* Moreover, every other circuit has followed suit in requiring that civil rights complaints be pleaded with at least a minimum of specificity.[3] This pleading requirement has been interpreted to mean that a

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[3]See: *Dartmouth Review* v. *Dartmouth College,* 889 F.2d 13, 16 (1st Cir. 1989); *Dewey* v. *University of N.H.,* 694 F.2d 1, 3 (1st Cir. 1982), *cert. denied,* 461 U.S. 944 (1983); *Hurney* v. *Carver,* 602 F.2d 993, 995 (1st Cir. 1979) (court need not "conjure up" unpled facts to support conclusory allegations); *Fisher* v. *Flynn,* 598 F.2d 663, 665 (1st Cir. 1979) (civil rights complaint must do more than state simple conclusions); *Sherma* v. *Yakahi,* 549 F.2d 1287 (1st Cir. 1977); *Salahuddin* v. *Cuomo,* 861 F.2d 40, 42 (2d Cir. 1988); *Fonte* v. *Board of Managers,* 848 F.2d 24 (2d Cir. 1988); *Alfaro Motors* v. *Ward,* 814 F.2d 883 (2d Cir. 1987); *Barr* v. *Abrams,* 810 F.2d 358 (2d Cir. 1987); *Martin* v. *Merola,* 532 F.2d 191 (2d Cir. 1976); *Fine* v. *City of N.Y.,* 529 F.2d 70 (2d Cir. 1975);

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plaintiff must allege the manner in which his rights were violated, the time, the place, and those responsible. *Hall* v. *Pennsylvania State Police*, 570 F.2d 86 (3rd Cir. 1978). Plaintiffs must present nonconclusory allegations containing evidence of unlawful intent in their complaint or the case should be dismissed prior to the taking of any discovery.

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Albany Welfare Rights Org. Day Care Center v. *Schreck*, 463 F.2d 620 (2d Cir. 1972); *Rose* v. *Bartle*, 871 F.2d 331 (3d Cir. 1989); *Freedman* v. *City of Allentown*, 853 F.2d 1111 (3d Cir. 1988); *Colburn* v. *Upper Darby Township*, 838 F.2d 663 (3d Cir. 1988); *District Council 47* v. *Bradley*, 795 F.2d 310 (3d Cir. 1986); *Pace Resources* v. *Shersbury Township*, 808 F.2d 1023 (3d Cir.), *cert. denied*, 107 S.Ct. 2482 (1987); *Frazier* v. *Southeastern Pa. Transp. Auth.*, 785 F.2d 658 (3d Cir. 1986); *Bartholomew* v. *Fischl*, 782 F.2d 1148 (3d Cir. 1986); *Ross* v. *Meagan*, 638 F.2d 646 (3d Cir. 1981); *Rotolo* v. *Borough of Charleroi*, 532 F.2d 920 (3rd Cir. 1976). *Hall* v. *Pennsylvania State Police*, 570 F.2d 86, 89 (3rd Cir. 1978) (complaint must be sufficiently precise to give notice of claims asserted); *Reeves* v. *Charles County*, 882 F.2d 870 (4th Cir. 1989); *Ogilbee* v. *Western Dist. Guidance Center*, 658 F.2d 257 (4th Cir. 1981); *Smith* v. *International Longshoremen's Ass'n.*, 592 F.2d 225, 226 (4th Cir. 1979) (Federal Rules of Civil Procedure, Rule 8(a) and (e), require definiteness in complaint); *Wetherington* v. *Phillips*, 526 F.2d 591 (4th Cir. 1975), aff'g mem., 380 F.Supp. 426, 428 (E.D.N.C. 1974) (failure to allege facts showing constitutional deprivation leads to dismissal); *Lewis* v. *Woods*, 848 F.2d 649 (5th Cir. 1988); *Palmer* v. *San Antonio*, 810 F.2d 514 (5th Cir. 1987); *Jacquez* v. *Procunier*, 801 F.2d 789 (5th Cir. 1986); *Morrison* v. *Baton Rouge*, 761 F.2d 242 (5th Cir. 1985); *Elliott* v. *Perez*, 751 F.2d 1472 (5th Cir. 1985); *Jewell* v. *Covington, Ga.*, 425 F.2d 459, 460 (5th Cir. 1970) (general conclusory allegations unsupported by any facts do not constitute cause of action), *cert. denied*, 400 U.S. 929, 91 S.Ct. 195, 27 L.Ed.2d 189 (1970); *Chapman* v. *Detroit*, 808 F.2d 459 (6th Cir. 1986); *Place* v. *Shepherd*, 446 F.2d 1239, 1244 (6th Cir. 1971) (pleading is not sufficient to state cause of action under Civil Rights Act "if its allega-

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A government official's motive or purpose is often an essential element of plaintiff's *prima facia* constitutional claim. *See, e.g., Washington* v. *Davis,* 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976) (discriminatory intent required to establish violation of equal protection guarantee); *Estelle* v. *Gamble,* 429 U.S. 97, 104-05, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976) ("deliberate indifference" required to show violation of prohibition against cruel and unusual punishment); *Wayne* v. *United States,* 470 U.S. 598, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985) (selective prosecution claim must be supported by evidence of discriminatory purpose). *See generally Note, Quali-*

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tions are but conclusions"); *Cohen* v. *Illinois Inst. of Technology,* 581 F.2d 658, 663 (7th Cir. 1978) (some particularized facts demonstrating a constitutional deprivation are needed to sustain cause of action under Civil Rights Act), *cert. denied,* 439 U.S. 1135, 99 S.Ct. 1058, 59 L.Ed.2d 97 (1979); *Arnold* v. *Jones,* 891 F.2d 1370, 1373 n.3 (8th Cir. 1989); *Nickens* v. *White,* 536 F.2d 802, 803 (8th Cir. 1976) (civil rights pleadings must not be conclusory); *Anderson* v. *Sixth Judicial Dist. Court,* 521 F.2d 420 (8th Cir. 1975); *Jones* v. *Community Redev. Agency,* 733 F.2d 646 (9th Cir. 1984); *Keniston* v. *Roberts,* 717 F.2d 1295 (9th Cir. 1983); *Uston* v. *Airport Casino, Inc.,* 564 F.2d 1217 (9th Cir. 1977) (complaint must contain specific factual allegations to support claim of conspiracy); *Kennedy* v. *H.M. Landing,* 529 F.2d 987 (9th Cir. 1976); *Williams* v. *Gorton,* 529 F.2d 668 (9th Cir. 1976); *Dunn* v. *White,* 800 F.2d 1188, 1198 (10th Cir. 1989); *Wise* v. *Bravo,* 666 F.2d 1328 (10th Cir. 1981); *Coopersmith* v. *Supreme Court,* 465 F.2d 993, 994 (10th Cir. 1972) (under federal rules, complaint must state factual basis for claim asserted); *Arnold* v. *Board of Educ.,* 880 F.2d 305, 310 (11th Cir. 1989); *Fullman* v. *Graddick,* 739 F.2d 553, 556-57 (11th Cir. 1984); *Martin* v. *D.C. Metropolitan Police Department,* 812 F.2d 1425, 1433 (D.C. Cir. 1987) upon reh'g en banc vacated as to 1434 et seq., only, 817 F.2d 144 (1987), and reinstated, reh'g dismissed on reconsideration, en banc, 824 F.2d 1240 (1987); *Hobson* v. *Wilson,* 737 F.2d 1, 30 (D.C. Cir. 1984), *cert. denied sub nom. Brennan* v. *Hobson,* 470 U.S. 1084 (1985).

fied Immunity for Government Officials: The Problem of Unconstitutional Purpose In Civil Rights Litigation, 95 YALE ___-126, 134-36 (1985); *Kirkpatrick, Defining a Constitutional Tort Under Section 1983; The State-of-Mind Requirement,* 46 U. Cin.L.Rev. 45 (1977).

Martin v. *D.C. Metropolitan Police Department,* 812 F.2d 1425, 1433 (D.C. Cir. 1987), ftnt. 17, upon reh'g en banc vacated as to 1434 et seq. only 817 F.2d 144 (1987), and reinstated reh'g dismissed on reconsideration, en banc 824 F.2d 1240 (1987).

In the case at bar Petitioner, has stated that she was placed in the office of Division Director of Child Support by a former Governor, Martha Layne Collins. She then states that when Governor Collins was succeeded by Governor Wilkinson, he replaced her with a member of his "political faction." Mertens does not allege that she supported anyone in the Democratic primary or that she opposed the "Wilkinson faction" of the Democratic Party. There is no allegation that she publicly criticized the Wilkinson administration, much less that she was replaced for such criticism. Certainly the privacy of the voting booth was not violated.

The law is clear that the heightened pleading standards required of claims brought under 42 USC § 1983 demand that allegations be more than mere conclusions or unwarranted factual inferences. By tortuous, if not blatantly fallacious, reasoning Petitioner asks this Court to recognize that Collins did not support Wilkinson, to then assume that because Collins placed Mertens, Mertens did not support Wilkinson and, therefore, to conclude that Mertens' dismissal was a wrongful violation of her First Amendment rights. The Circuit Court was quite thorough in its analysis of Mertens' claim in its Order of June 20, 1989:

> . . . This Court is aware that there are certain nebulae in the protection of the Constitution. This Court does, however, require that Plaintiff outline the contours of something that is discernible in the mist. Even after having been given leave to file an Amended Complaint and having been made aware of this Court's requirement that heightened pleading requirements be met in order to state a claim, Plaintiff has not done so. The Court will not attempt to detail the leaps of logic and flights of fancy that would be required in order to find a claim stated here. Let us simply state that the Court does not feel compelled to *assume* along with Plaintiff, that others acted under the influence of unconstitutional motives when the few facts presented lend themselves just as easily to interpretations that carry no constitutional violation. Further the Court does not feel compelled to *assume* that a position of Division Director is not a policy making position when Plaintiff has provided nothing other than her own *conclusions* to refute the presumption created by the statutory inclusion of division director positions in the unclassified service. (Emphasis provided).

By statute, the position formerly held by Mertens, that of Division Director, is unclassified [KRS 18A.115(i)], the person holding such being subject to dismissal upon written notice by the appointing authority. ". . . for cause or without cause." 101 KAR 3:050(3). In stating her case, Petitioner merely appended a claim that such discharge was done with unconstitutional motive. See: *Hobson* v. *Wilson*, 737 F.2d at 29. (D.C. Cir. 1984)

Finally, pleading in federal courts, as in this Commonwealth, is notice pleading. It is only in actions brought pursuant to 42 USC § 1983, where motive is the issue, *i.e.* unjust dismissal, that heightened pleading standards are mandated. This federal statute creates a substantive right and, in pleading such, federal substantive as well as proce-

dural law is applicable. The mere fact that state court claims do not require pleadings with specificity is totally irrelevant to the issue of § 1983 pleading.

Clearly, Petitioner failed to state a claim under the heightened requirements of civil rights actions as set forth herein. This failure supports dismissal of the complaint. *Chapman* v. *City of Detroit, supra;* cf. *Smith* v. *Rose,* 760 F.2d 102, 106 (6th Cir. 1985).

CONCLUSION

For the reasons stated above, Respondents pray that this Court deny the Petitioner for Writ of Certiorari.

Respectfully submitted,

COMMONWEALTH OF KENTUCKY
CABINET FOR HUMAN RESOURCES

BY:_____

TRISHA ZELLER JAMES
Department of Law
275 East Main Street, 4-W
Frankfort, KY 40621
Assistant General Counsel

APPENDIX

[EXCERPTS FROM KENTUCKY REVISED STATUTES]

18A.005. Definitions for KRS 18A.010 to 18A.200.— As used in this chapter, unless the context indicates otherwise:

(1) "Appointing authority" means the agency head or any person whom he has authorized by law to designate to act on behalf of the agency with respect to employ appointments, position establishments, payroll documents, register requests, waiver requests, requests for certification or other position actions. Such designation shall be in writing and signed by both the agency head and his designee. Prior to the exercise of appointing authority, such designation shall be filed with the commissioner;

(2) "Base salary or wages" means the compensation to which an employe is entitled under the salary schedules adopted pursuant to the provisions of KRS 18A.030 and 18A.110. Base salary or wages shall be adjusted as provided under the provisions of KRS 18A.355 and 48.130;

(3) "Board" means the personnel board created by KRS 18A.045;

(4) "Career employe" shall mean a state employe with sixteen (16) or more years of permanent full-time state service, or the part-time employment equivalent of at least sixteen (16) years of full-time state service. The service may have been in the classified service, the unclassified service, or a combination thereof;

(5) "Certification" means the referral of the name of one (1) or more qualified prospective employes by the commissioner on request of an appointing officer for consideration in filling a position in the classified service;

(6) "Class" means a group of positions sufficiently similar as to duties performed, scope of discretion and re-

sponsibility, minimum requirements of training, experience, or skill, and such other characteristics that the same title, the same tests of fitness, and the same schedule of compensation have been or may be applied to each position in the group;

(7) "Classified service" includes all the employment subject to the terms of this chapter except for those positions expressly cited in KRS 18A.115; a "classified position" is a position in the classified service;

(8) "Commissioner" means the commissioner of the department of personnel as provided for in KRS 18A.015;

(9) "Demotion" means a change in the rank of an employe from a position in one (1) class to a position in another class having a lower minimum salary range or less discretion or responsibility;

(10) "Department" means the department of personnel provided for in KRS 18A.015, unless the context indicates otherwise;

(11) "Eligible" refers to a person who has made a passing score on any examination required under KRS 18A.010 to 18A.200 and who has qualified to be placed on a register;

(12) "Emergency employe" means an employe appointed without regard to the examination requirements of KRS 18A.010 to 18A.200 to any position by reason of a governmental emergency. An emergency appointment shall not exceed thirty (30) working days in duration and is nonrenewable;

(13) "Employe" means a person regularly appointed to a position in the state service for which he is compensated on a full-time or part-time basis;

(14) "Federally funded time-limited employe" means an employe appointed to a federally funded time-limited

position and, except as provided in KRS 18A.115, may in all other respects be entitled to the benefits provided permanent, full-time regular employes as defined in this chapter;

(15) "Federally funded time-limited position" means a position created for the specific purpose of providing public service employment or one-time special or research project services for a limited period of time and shall not exceed the period of time for which that special federal funding is provided;

(16) "Initial probation" means the period of service following initial appointment to any position under KRS 18A.010 to 18A.200 which requires special observation and evaluation of an employe's work and which must be passed successfully before status may be conferred as provided in KRS 18A.110 and by the provisions of this chapter. If the appointee is granted leave in excess of twenty (20) consecutive work days during this period, his initial probation shall be extended for the same length of time as the granted leave to cover such absence. "Initial probation" does not include probationary period served by a laid-off employe who accepts a bona fide written offer of appointment;

(17) "Penalization" shall include, but not be limited to, demotion, dismissal, suspension, fines and other disciplinary actions, involuntary transfers; salary adjustments; any action that diminishes the level, rank, discretion or responsibility of an employe without proper cause, including a reclassification or reallocation; and the abridgement or denial of other rights granted to state employes;

(18) "Position" means an office or employment in an agency (whether part-time, full-time, permanent, temporary, seasonal, federally funded time-limited, or emergency, occupied or vacant) involving duties requiring the services of one (1) person;

(19) "Promotion" means a change of rank of an employe from a position in one (1) class to a position in another class having a higher minimum salary or carrying a greater scope of discretion or responsibility;

(20) "Promotional probation" means the six (6) month period of service following the promotion of an employe with status which must be successfully completed in order for the employe to retain the position to which he has been promoted. If the employe is granted leave in excess of twenty (20) consecutive work days during this period, his promotional probation shall be extended for the same length of time as the granted leave to cover such absence;

(21) "Provisional employe" means any employe appointed on a temporary or interim basis to permanent position under KRS 18A.010 to 18A.200 without examination, such appointment being made necessary by the absence of a register for the position involved and by the time limitations and prohibition on renewal as defined in KRS 18A.110(5)(h);

(22) "Reallocation" means the correction of the classification of an existing position by placement of the position into the classification that is appropriate for the duties the employe has been and shall continue to perform;

(23) "Reclassification" shall mean the change in the classification of an employe when a material and permanent change in the duties or responsibilities of that employ occurs;

(24) "Reemployment" shall mean the rehiring of an employe with status who has been laid off;

(25) Reemployment register" means the separate list of names of persons who have been separated from state service by reason of layoff. Reemployment registers shall be used as provided by the provisions of KRS 18A.110, 18A.130, and 18A.135;

(26) "Register" means any official list of eligibles for a particular class and, except as provided in this chapter, placed in rank order according to the examination scores maintained for use in making original appointments or promotions to positions in the classified service;

(27) "Reinstatement" shall mean the restoration of an employe who has resigned in good standing, or who has been ordered reinstated by the board or a court to a position in his former class, or to a position of like status and pay;

(28) "Seasonal employe" means an employe appointed to a seasonal position;

(29) "Seasonal position" means a position that is temporary, coincides with a particular season or seasons of the year, and does not exceed eleven (11) months' duration;

(30) "Seniority" mean the total number of months of state service;

(31) "Status" means the acquisition of tenure with all rights and privileges granted by the provisions of this chapter after satisfactory completion of the initial probationary period by an employe in the classified service;

(32) "Temporary employe" means an employe appointed to a temporary position;

(33) "Temporary position" means a position that is created for a definite period of time not to exceed six (6) months and not renewable;

(34) "Transfer" means a movement of any employe from one (1) position to another of the same grade having the same salary ranges, the same level of responsibility within the classified service and the same salary received immediately prior to transfer. (Repealed, reenact. and amend. 1982, ch. 448, § 1, effective July 15, 1982; 1986, ch. 494, § 7, effective July 15, 1986; 1988, ch. 129, § 1, effective July 15, 1988; 1988, ch. 203, § 1, effective July 15, 1988.)

* * * * * * *

18A.115. Employment exempted from classified service—Reversion rights of career employes promoted outside classified service.—

(1) The classified service to which KRS 18A.005 to 18A.200 shall apply shall comprise all positions in the state service now existing or hereafter established, except the following:

(a) The general assembly and employes of the general assembly including the employes of the legislative research commission;

(b) Officers elected by popular vote and persons appointed to fill vacancies in elective offices;

(c) Members of boards and commissions;

(d) Officers and employes on the staff of the governor, the lieutenant governor, the office of the secretary of the governor's cabinet, and the office of program administration;

(e) Cabinet secretaries, commissioners, office heads, and the administrative heads of all boards and commissions, including the executive director of Kentucky Education Television;

(f) Employes of Kentucky Educational Television who have been determined to be exempt from classified service by the Kentucky Authority for Educational Television, which shall have sole authority over such exempt employes for employment, dismissal and setting of compensation, up to the maximum established for the executive director and his principal assistants;

(g) One (1) principal assistant or deputy for each person exempted under subsection (1)(e) of this section;

(h) One (1) additional principal assistant or deputy as may be necessary for making and carrying out policy for each person exempted under subsection (1)(e) of this sec-

tion in those instances in which the nature of the functions, size or complexity of the unit involved are such that the commissioner approves such an addition on petition of the relevant cabinet secretary or department head and such other principal assistants, deputies, or other major assistants as may be necessary for making and carrying out policy for each person exempted under subsection (1)(e) of this section in those instances in which the nature of the functions, size or complexity of the unit involved are such that the board may approve such an addition or additions on petition of the department head approved by the commissioner;

(i) Division directors subject to the provisions of KRS 18A.170. Division directors in the classified service as of January 1, 1980, shall remain in the classified service;

(j) Physicians employed as such;

(k) One (1) private secretary for each person exempted under subsection (1)(e), (g) and (h) of this section;

(l) The judicial department, referees, receivers, jurors, and notaries public;

(m) Officers and members of the staffs of state universities and colleges and student employes of such institutions; officers and employes of the teachers' retirement system; and officers, teachers, and employes of local boards of education;

(n) Patients or inmates employed in state institutions;

(o) Persons employed in a professional or scientific capacity to make or conduct a temporary or special inquiry, investigation, or examination on behalf of the general assembly, or a committee thereof, or by authority of the governor, and persons employed by state agencies for a specified, limited period to provide professional, technical, scientific, or artistic services under the provisions of KRS 45.700 to 45.720;

(p) Seasonal, temporary, and emergency employes;

(q) Federally funded time-limited employes;

(r) Officers and members of the state militia;

(s) State police troopers and sworn officers in the department of state police, justice cabinet;

(t) University or college engineering students or other students employed part-time or part-year by the state through special personnel recruitment programs; provided that while so employed such aides shall be under contract to work full-time for the state after graduation for a period of time approved by the commissioner or shall be participants in the cooperative education program approved by the commissioner;

(u) Superintendents of state mental institutions, including heads of mental retardation centers, and penal and correctional institutions as referred to in KRS 196.180(2);

(v) Staff members of the Kentucky Historical Society, if they are hired in accordance with KRS 171.311;

(w) County and Commonwealth's attorneys and their respective appointees;

(x) Chief district engineers and the state highway engineer.

(2) Nothing in KRS 18A.005 to 18A.200 is intended, or shall be construed, to alter or amend the provisions of KRS 150.022 and 150.061.

(3) Nothing herein is intended or shall be construed to affect any non-management, nonpolicy-making position which must be included in the classified service as a prerequisite to the grant of federal funds to a state agency.

(4) Career employes within the classified service promoted to positions exempted from classified service shall,

upon termination of their employment in the exempted service, revert to a position in that class in the agency from which they were terminated, if a vacancy in that class exists. If no such vacancy exists, they shall be considered for employment in any vacant position for which they were qualified pursuant to KRS 18A.130 and 18A.135.

(5) Nothing herein shall be construed as precluding appointing officers from filling unclassified positions in the manner in which positions in the classified service are filled except as otherwise provided herein. (Enact. Acts 1982, ch.52, § 1, effective July 15, 1982; 1982, ch. 393, § 12, effective July 15, 1982; repealed, reenacted and amended by 1982, ch. 448, § 23, effective July 15, 1982; 1984, ch. 253, § 1, effective July 13, 1984; 1984, ch. 350, § 10, effective July 13, 1984; 1986, ch. 494, § 18, effective July 15, 1986.)

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18A.170. Certification of division directors who do not make policy.—It is further provided that the responsible departmental, board, commission or agency head shall at the time as which he elects to come under the provisions of KRS 18A.005 to 18A.200, certify to the board the positions of those division directors or heads under their jurisdiction whose duties are nonpolicy making together with a sufficient statement of their duties to enable the board to determine whether or not, as a matter of fact, such duties are nonpolicy making in their nature. He shall, at any time subsequent to coming under the provisions of KRS 18A.005 to 18A.200 certify to the board additional division directors or heads whose duties are nonpolicy making. At the time of certification notice thereof shall be given to the interested division director or head in the form of a copy of the statement certifying the duties of his office. The board may conduct such hearings as it may deem necessary, and shall conduct hearings pursuant to the administrative provisions of KRS 18A.095 in the event

of a difference of opinion between the certifying officer and the interested division director or head, before entering its findings of fact and an order either classifying or denying classification to such position. Either the certifying officer or the division director or head may appeal the findings of fact and the final order of the board by initiating action in the Franklin Circuit Court pursuant to the provisions of KRS 418.040 et seq. (Repealed, reenact. and amend. 1982, ch. 448, § 34, effective July 15, 1982.)